The court rejected petitioner's argument that the program was not neutral because the Corporation uses "discretionary" criteria in selecting grantees. Pet. App. 8a-9a. Because the discretionary criteria pertain to the secular purposes of the program, have no religious content, are neutral with respect to religion, and have not been used to favor religious organizations, as petitioner conceded (*id.* at 9a), the court of appeals could discern no reason "[w]hy, as a matter of constitutional law," the mere existence of some measure of judgment in the program ought to render the program an impermissible establishment of religion. *Id.* at 8a (citing *Bowen* v. *Kendrick*, 487 U.S. 589 (1988)).

The court of appeals also rejected petitioner's contention that an individual's decision to teach at a religious school is not a genuine and independent private choice because the government selects qualifying programs in advance. Pet. App. 9a. The court noted that the program provides manifold teaching opportunities at secular private and public schools—"only 328 of the 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools." *Id.* at 10a. The court also found no evidence that any individual who wanted to teach at a secular school had ever been compelled, by dint of a sponsor shortage, to teach at a sectarian school. The court of appeals accordingly held that an individual's choice to perform service hours in a religious setting was both genuine and independent. *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the government was prohibited from partially reimbursing sponsoring programs for expenses related to administering the Education Awards program. The court noted that, in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646

(1980), this Court had upheld a program that similarly provided "direct cash reimbursement[s]" to religious and secular private schools for performing tests mandated by state law. Pet. App. 11a (quoting *Regan*, 444 U.S. at 657). The court recognized that the AmeriCorps program did not employ the same extensive audit procedures as in *Regan*, but reasoned that "here audits would be senseless," *id.* at 11a-12a, because the "evidence showed" that the $400 payment was "much less than the actual administrative costs grantees incur per participant," *id.* at 12a.

ARGUMENT

The unanimous decision of the court of appeals upholding the challenged provisions of the AmeriCorps Education Awards program against constitutional challenge is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

1. a. Petitioner contends (Pet. 13-17) that the court of appeals' decision conflicts with this Court's decision in *School District of City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). In *Ball*, this Court struck down two programs under which public school employees taught secular subjects on the grounds of pervasively sectarian schools during the school day (the "Shared Time" program) and after school (the "Community Education" program). *Id.* at 375-377. This Court held that those programs had the effect of promoting religion and unduly entangling government with religion in three respects: (i) the pervasively sectarian environment might cause public employees to indoctrinate students in religious matters; (ii) the symbolic union of church and state might convey a message of state support for religion to

the students; and (iii) the programs had the effect of financially subsidizing the students' religious education. *Id.* at 386-397.

As the court of appeals recognized (Pet. App. 6a-7a), this Court overturned "[m]uch of the reasoning in *Ball*" in *Agostini* v. *Felton*, 521 U.S. 203 (1997), as "inconsistent with our current understanding of the Establishment Clause." *Id.* at 236. In particular, *Agostini* rejected "the presumption erected in * * * *Ball* that the placement of public employees on parochial school grounds * * * constitutes a symbolic union between government and religion." *Id.* at 223. *Agostini* also discarded *Ball*'s presumption "that public employees will inculcate religion simply because they happen to be in a sectarian environment," and "abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully." *Id.* at 234.

Accordingly, petitioner's argument (Pet. 15) that the Education Awards program symbolically fuses or "blur[s]" the "religious and non-religious" by financially rewarding an individual for teaching secular subjects in a religious school classroom and by failing to disqualify the teacher if she engages in religious instruction on her own time depends upon the very "symbolic union" rationale from *Ball* that this Court expressly rejected in *Agostini*, 521 U.S. at 223. Petitioner's concerns that sponsors or individuals will improperly rely upon time engaged in religious activities to qualify an individual for an educational award (Pet. 19-20; Pet. App. 10a-11a) or that sponsors will impermissibly divert administrative reimbursements to proscribed religious activities (Pet. 21-25), likewise rest upon *Ball*'s now-rejected view that a sectarian environment might somehow cause individu-

als to fail to "to discharge their duties faithfully," *Agostini*, 521 U.S. at 234.

b. Petitioner's argument (Pet. 13) that the Education Awards program violates *Ball* because it "subsidize[s] the salaries of sectarian school teachers who engage in religious indoctrination" fundamentally misunderstands the program at hand. Individuals who participate in the AmeriCorps Education Awards program are *not* employees of the AmeriCorps program or public employees in any other sense. They do not work for AmeriCorps, they have no contract with AmeriCorps, and they receive no subsidy, stipend, or salary from AmeriCorps. Nor are they placed in a religious school by any government official. As the court of appeals stressed, the participants place themselves in the programs "only as the result of their own genuine and independent private choice." Pet. App. 7a (internal quotation marks omitted).

Petitioner's foundational assumption (Pet. 13) that AmeriCorps is somehow financing "religious indoctrination" is thus wholly misplaced. AmeriCorps offers no financial reward for teaching religion or leading students in prayer. To the contrary, the program explicitly prohibits the provision of an award for "[e]ngaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, * * * or engaging in any form of religious proselytization." 45 C.F.R. 2520.30(a)(7).

All that the Education Awards program does is decline to disqualify individuals who have performed the requisite secular work from receiving an award, just because those same individuals also engaged in religious activities on their own initiative. Furthermore, the pro-

gram prohibits individuals from crediting any time spent engaged in religious activities towards qualifying for an AmeriCorps education award, which eliminates any potential programmatic incentive to engage in those activities. 45 C.F.R. 2520.30(a).

That recognition of secular service performed in a religious setting is in no sense a governmental endorsement or inculcation of a religious message. It is simply a programmatic recognition that the value of the individual's secular contribution is not diminished or erased by the religius setting or participants' additional religious activities. And offering individuals the same post hoc financial award that all those who perform qualifying community service in a secular setting receive—a payment that the individual uses to meet her own personal educational expenses—bears little resemblance to the salary subsidies about which petitioner is concerned. Indeed, to design the program otherwise would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives." *Mitchell* v. *Helms*, 530 U.S. 793, 827-828 (2000) (plurality opinion).

As the court of appeals recognized (Pet. App. 7a-10a), this Court has made clear in a line of cases that such true private choice programs do not violate the Establishment Clause. In *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), for example, this Court held that, when a government program is neutral toward religion and "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the Establishment Clause is not violated. *Id.* at 652; see *id.* at 653 ("We have never found a program of true private choice to offend the Establish-

ment Clause."; recounting precedents). The Education Awards program, under which no public employee teaches any subject in a religious school and in which the federal educational award is for the sole use of the individual and never even indirectly, let alone directly, is paid over to the religious school, is a quintessential "true private choice program," *id.* at 653, and, if anything, has even less Establishment Clause implications than the tuition vouchers upheld in *Zelman*. See Pet. App. 7a, 9a-10a.

Petitioner further errs in arguing (Pet. 16-17) that a reasonable observer would perceive the Education Awards program as a governmental endorsement of the individual's religious activities. "[T]he reasonable observer in the endorsement inquiry must be deemed to be aware of the history and context underlying a challenged program." *Zelman*, 536 U.S. at 658 (internal quotation marks omitted). Here, because the individual teaches religious, as well as secular, subjects as an employee of the religious school, and not as an employee, contractor, or any other type of formal affiliate of the AmeriCorps program, there is no plausible basis for perceiving governmental endorsement of the religious message simply by virtue of the government's post hoc provision of a personal educational award for documented secular service to an individual who happens to have made a separate and independent choice to engage in religious instruction on her own time.

Indeed, the court of appeals' rejection of that same argument (Pet. App. 7a-8a) was a direct application of *Zelman*, in which this Court held that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of

private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 655. While petitioner is correct (Pet. 16-17) that participants rather than students choose where their qualifying public service will be performed, that is no different than *Zelman*, where the direction of tuition aid likewise turned upon the decisions of adults rather than the students, see 536 U.S. at 646. That intervention of private choice, moreover, stands in sharp contrast to *Ball*, where governmental aid ran to the schools directly and exclusively as a result of the decisions of government officials. 473 U.S. at 377.

Finally, petitioner's contention (Pet. 18) that *Zelman* does not apply because a governmental program can qualify as a program of true private choice only if it utilizes "fixed, mechanical criteria" is without merit. This Court has already upheld as neutral programs of true private choice government aid programs with selection criteria necessitating a degree of subjective judgment. See, *e.g.*, *Zelman*, 536 U.S. at 645 (qualifying schools cannot "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion"); *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring) (providing funds to local educational agencies for "'innovative assistance programs' designed to improve student achievement"); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 483 n.2 (1986) (beneficiary must "reasonably be expected to benefit from vocational rehabilitation services in terms of employability").

Furthermore, nothing in the record establishes that the types of discretionary judgments permitted in identifying sponsors and programs are a facade for constitutionally proscribed discrimination. To the contrary, pe-

titioner "conceded at oral argument that there was no evidentiary support" for the proposition that "the Corporation had used its discretionary authority to favor religious organizations." Pet. App. 9a.[2]

2. Petitioner seeks (Pet. 17-18) this Court's review to resolve a purported "split of authority" between the decision below and the decisions of two other courts of appeals concerning whether a government program that employs discretionary selection criteria can qualify as a program of private choice for Establishment Clause purposes. There is no such conflict. In fact, the only other court of appeals' decision of which we are aware that directly addresses the issue has held—consistent with the court of appeals' decision here—that a true program

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[2] Petitioner complains (Pet. 19-20) that the court of appeals incorrectly placed the burden on it to show that the government was discriminating in favor of religion. But it is petitioner who, as the plaintiff, leveled a challenge to the constitutionality of federal law and to government officials' presumptively lawful administration of that law, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *Mitchell*, 530 U.S. at 863-864 (2000) (O'Connor, J., concurring), and it is thus petitioner who bears the burden of demonstrating that the program, facially or as applied, violates the Establishment Clause. See *Schaffer* v. *Weast*, 126 S. Ct. 528, 534 (2005). Moreover, the Corporation introduced substantial evidence showing that the overwhelming majority of program sponsors are secular, as are the vast majority of service opportunities. See Pet. App. 10a. Nothing in law or logic required the government at that juncture to go further and disprove petitioner's unsubstantiated allegations that, in practice, its facially neutral selection criteria are employed to favor religion. Petitioner's observation (Pet. 21) that the six current, religiously affiliated sponsors represent Christian denominations is not enough, for not even petitioner suggests that the Education Awards program reflects some sort of impermissible denominational preference. Indeed, there is no evidence that any otherwise qualified non-Christian organization applied unsuccessfully to be a program sponsor.

of private choice may permissibly use discretionary criteria that are neutral toward religion. See *Freedom From Religion Found., Inc.* v. *McCallum*, 324 F.3d 880, 881-884 (7th Cir. 2003).

Petitioner's own description of *Eulitt* v. *Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), as simply raising in a footnote a "question[]" (Pet. 18) about the use of discretionary criteria confesses the absence of any genuine conflict posed by that decision. Indeed, *Eulitt* addressed only an Equal Protection Clause challenge to a state statute that authorized public funding of tuition for private secular schools, but not for private religious schools. 386 F.3d at 346. The First Circuit noted, in the course of its decision, that Maine's tuition voucher program differed from *Zelman*, in part because the Maine program required an "individualized assessment of educational benefit." *Id.* at 349 & n.1. But the court did not suggest, let alone hold, that the existence of such discretion was dispositive, or that the Establishment Clause otherwise forbids the use of any criteria that require non-mechanical application.

Petitioner's reliance (Pet. 17-18) on *Stark* v. *St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), fares no better. In that case, the Eighth Circuit invalidated a program under which students at a state university earned school credit for teaching at any religious or secular school approved by the university. *Id.* at 1047. Relying on *Ball*, the Eighth Circuit held that, by permitting even indirect aid to religious schools, the program created a "symbolic link between the state and the church" and a "significant danger" that participants would, "intentionally or inadvertently, inject religious tenets into their teaching." *Id.* at 1051-1052.

This Court's decision in *Agostini* definitively rejected both of the grounds on which the 19-year-old *Stark* decision rests. See 521 U.S. at 223, 234. The Eighth Circuit has not applied *Stark*'s Establishment Clause analysis since *Agostini*, and this Court's intervening Establishment Clause precedents would foreclose doing so. See *Stark* v. *Independent Sch. Dist., No. 640*, 123 F.3d 1068 (8th Cir. 1997) (adhering to *Agostini*, and refusing to follow *Ball*, in case upholding the creation and operation of a public school that, while open to all students, also accommodated the needs of a particular religious group), cert. denied, 523 U.S. 1094 (1998).

3. Finally, petitioner seeks (Pet. 21-25) this Court's review of the court of appeals' ruling upholding the Corporation's practice of allowing religious sponsors to receive the identical $400-per-participant reimbursement for administrative expenses that the program affords to all other program sponsors. As the court of appeals recognized (Pet. App. 11a), in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), this Court held that the government may allow religious entities to receive "direct cash reimbursement[s]" on the same terms as secular institutions for administrative expenses that they incur as a result of a secular governmental program. *Id.* at 657. There is no dispute that the Education Awards program imposes administrative requirements on program sponsors, such as "train[ing] participants, provid[ing] them with adequate supervision by qualified supervisors, keep[ing] various records, and mak[ing] regular reports to [the Corporation]." Pet. App. 11a. Furthermore, the court of appeals concluded (*id.* at 12a) that the $400 reimbursement allotted by the Corporation "is much less than the actual administrative costs" that sponsors incur for each individual participat-

ing in the Education Awards program, and petitioner presented no evidence to the contrary.

Instead, petitioner's principal argument is that such payments must be accompanied by "extensive reporting and auditing requirements" (Pet. 24). The court of appeals properly rejected that argument as "senseless" (Pet. App. 12a), given that the administrative costs actually incurred consistently exhaust the reimbursement amount, leaving nothing to be diverted. Given the small amount of money at issue (especially relative to the size of the administrative expenses it reimburses), and that access to that money depends upon the intervening and unfettered decisions of private individuals, the monthly interactions between AmeriCorps monitors and sponsors, as supplemented by annual inspections, see C.A. App. 754-757, are more than sufficient to eliminate any constitutionally cognizable risk that the money will be misused.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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No. 05-282

IN THE

Supreme Court of the United States

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether an AmeriCorps program under which individual participants choose service opportunities from an array of options selected under neutral criteria is properly analyzed under this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), rather than under *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)?

2. Whether a government program involving "discretionary criteria" to select grantees is a neutral private choice program where there is no allegation or evidence that the "discretionary criteria" have been applied to favor religion and individuals choose from a wide range of approved grantees?

3. Whether auditing is necessary to ensure that funds provided to AmeriCorps grantees are restricted to secular purposes, where it is undisputed that the funds are "much less" than the grantees' secular administrative costs, the funds are restricted by statute and regulation to secular uses, and grantees are required to sign a specific assurance that these restrictions will be followed?

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). However, there are standing issues that threaten jurisdiction. *See infra* at 30.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions identified by Petitioner, 45 C.F.R. § 2540.100(b) is also relevant, and is set forth in Appendix A.

STATEMENT

1. Factual Background

The University of Notre Dame's ("Notre Dame") Alliance for Catholic Education ("ACE") is a graduate education program that also meets the needs of underserved schools. ACE participants teach subjects including science, mathematics, foreign languages, English, social sciences, and religion in needy Catholic schools. Pet. App. at 3a. ACE does not require participants to teach religion, only that they be willing to provide instruction in a Catholic school. JA0887-88, 1105, 1113.

ACE participants receive a salary from the schools in which they teach. JA0888. In addition, the schools pay a fee to Notre Dame which is used to cover administrative costs and to purchase health insurance for ACE teachers. *Id.* The total cost of an ACE teacher to a parochial school approximates that of an entry-level teacher. *Id.*; JA1144.

ACE enjoys a unique association with the Corporation for National and Community Service ("CNCS" or "the Corporation") and the AmeriCorps program. The opportunities to participate in AmeriCorps are virtually limitless, with the government leaving others — including the States, nonprofit organizations, and universities — to define the essence of their service programs. Participants may choose from a broad array of initiatives; the statute only requires that a program respond to "pressing unmet human,

educational, environmental, and public safety needs." 42 U.S.C. § 12501(a)(1). The statute includes "a church or other religious entity" as one of several types of organizations eligible to craft a program with qualifying national service positions. *Id.* § 12511(5).

The AmeriCorps Education Awards Program ("AEAP") provides limited funding to participating programs, and is designed for grantees, like Notre Dame, who are able to provide significant funding other than that received through AmeriCorps. *See* 61 Fed. Reg. 46,628-29 (Sept. 4, 1996); JA0748-49. The process used by the Corporation in selecting programs for participation in AEAP is set forth in program guidelines, and involves consideration of three neutral criteria — Program Design, Organizational Capacity, and Budget / Cost Effectiveness, each of which encompasses neutral subcriteria. JA1555-56.

Programs participating in AEAP include several, such as ACE, in which participants serve by teaching in disadvantaged schools. For fiscal year 2001, thirteen of the seventy-seven AEAP grantees involved service by teaching. JA0759. These grantees placed teachers in approximately 1608 elementary and secondary schools, of which only 328, or 20%, were religious schools. *Id.*; Pet. App. at 10a.

The funding provided under AEAP consists of two components. Pet. App. at 3a. AmeriCorps participants earn an education award of $4,725 if they provide at least 1700 hours of secular service. *See* 42 U.S.C. § 12602(a)(1); 45 C.F.R. § 2527.10(a); Pet. App. at 3a. In addition, grantees such as Notre Dame are entitled to a modest grant to assist in defraying the administrative costs of the program. In 2001-2002, ACE received $400 per participant in such grants, which represents less than 3% of ACE's annual budget. Pet. App. at 3a; JA0889.

Both types of AEAP funding come with detailed restrictions on their availability and use. Federal statutes and regulations and AmeriCorps grant provisions and guidelines

prohibit ACE teachers from earning AmeriCorps credit for any hours spent providing religious instruction or engaging in religious activities. 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b); Pet. App. at 7a; JA1490.[1] Similarly, grantees are prohibited from using any portion of an administrative grant "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). Accordingly, Notre Dame deposits funds received from the government in a restricted account and uses them only to offset secular program costs. Pet. App. at 34a.

However, the regulatory scheme takes care not to restrict private conduct unnecessarily. AEAP participants, grant provisions instruct, "may exercise their rights as private citizens" to participate in activities including "[e]ngaging in religious instruction, conducting worship services, or engaging in any form of religious proselytization," "on their initiative, on non-AmeriCorps time, and using non-Corporation funds." JA1490; Pet. App. at 7a. However, "[t]he AmeriCorps logo should not be worn while doing so." JA1490; Pet. App. at 7a.

The Corporation ensures that these rules are followed. JA0751-58, 0891-92. Grant applications must specify the applicant's plans for ensuring compliance with funding restrictions, and applicants must execute a specific assurance that they will comply with all rules regarding prohibited activities. JA0752-53, 0866, 0869. CNCS also requires grantee staff and participants to attend training on the rules

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[1] Petitioner erroneously cites 45 C.F.R. § 2520.30 as providing the relevant limitation on the activities of AmeriCorps participants. Pet. at 1, 2, 7 n.2, 9. But, as explained in the courts below by both the Corporation and Notre Dame, that provision applies only to AmeriCorps programs under Subtitle C of Title I of the National and Community Service Act. *See* 45 C.F.R. § 2520.30. AEAP programs are carried out under Subtitle H. JA0748.

regarding prohibited activities. JA0753, 0758, 1493. Grantees must review participants' timesheets to ensure that no time spent in religious activity is included. JA0892, 1505, 1544. Upon completing a term of service, participants must sign an Exit Form stating the number of AmeriCorps service hours performed, with the understanding that a willful false statement is punishable by a fine and/or imprisonment. JA0754, 0871-72. Every participant who serves in a religious school must sign an additional certification that the service hours reported on the Exit Form do not "include any religious instruction, worship, or proselytization." JA0754, 0874. CNCS personnel also conduct site visits to review time logs and interview participants and supervisors. JA0095-0100, 0755-56. Each grantee is required to submit to the Corporation an annual report following up on any compliance issues. JA0757.

Notre Dame also ensures compliance with AmeriCorps rules. JA0710-16, 0891-92, 0894-0939, 1094, 1098-1100, 1149, 1151-52, 1453. Through orientation sessions and written materials, Notre Dame describes and explains the prohibitions on religious activity to ACE participants and host schools. JA0710-11, 0891, 0896-98, 0906-39, 1099-1100, 1149, 1152, 1453. In addition, Notre Dame personnel visit sites where participants are serving to monitor compliance, JA0891-92, 1453, and require participants to complete time logs that emphasize that religious activity may not be included. JA0892, 0939, 1099.

2. Procedural Background

Petitioner filed this action against the Corporation on October 3, 2002, advancing a single count under the Establishment Clause. Petitioner sought a declaration and conforming injunction that the Establishment Clause forbade the Corporation "to approve or qualify the ACE Program, CNVS Program . . . and any other similar AmeriCorps program," or to provide funding to those programs or their

participants, if those participants, outside the scope of their secular AmeriCorps service hours, also provided religious instruction. JA0029 (Complaint, Prayer for Relief). Notre Dame intervened as a defendant. Following discovery, the District Court granted petitioner's motion for summary judgment and denied Notre Dame's and the Corporation's cross-motions for summary judgment. Pet. App. at 13a. The District Court entered an injunction, Pet. App. at 56a, which it later stayed pending appeal. JA0083.

The D.C. Circuit unanimously reversed the District Court, finding that the AEAP's provision of education awards to AmeriCorps participants for secular service was, like the school vouchers program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), a neutral program involving "genuine independent choice." Pet. App. at 9a. The D.C. Circuit also held that the fixed administrative grants provided to program sponsors such as Notre Dame were constitutional because they reimbursed sponsors for a portion of the secular administrative costs imposed on them by AmeriCorps requirements. Pet. App. at 11a-12a. Following the D.C. Circuit's unanimous opinion, petitioner filed a petition for rehearing *en banc*, which was denied without a single member of that court even calling for a vote. Pet. App. at 59a-60a.

REASONS FOR DENYING THE PETITION

The unanimous decision of the D.C. Circuit in this case involves a routine application of this Court's Establishment Clause precedents applicable to neutral private choice programs. According to petitioner, simply allowing individuals who provide secular service in a religious school to participate on equal footing with other AmeriCorps participants results in a governmental indoctrination of religion. This is so, petitioner claims, even though any participant who provides AmeriCorps service in a religious school has voluntarily chosen to do so from among a vast array of predominantly secular program options, and even

though no federal money is provided to either the AmeriCorps participants for any time spent in religious activity or to the religious schools at which they teach.

Petitioner's claims are irreconcilable with this Court's Establishment Clause jurisprudence and present no certworthy issue. Petitioner claims that the unanimous D.C. Circuit "usurped" this Court's authority when it concluded that *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), did not render the challenged program unconstitutional. But far from "overstep[ping] its bounds," Pet. at 2, the D.C. Circuit simply recognized that *Ball*'s core reasoning was rejected by *this* Court in *Agostini v. Felton*, 521 U.S. 203 (1997), and concluded that "the Supreme Court's more recent decisions upholding programs of true private choice, particularly *Zelman* . . . control this case."

Nor does petitioner's emphasis on the "discretionary" criteria for choosing AEAP grantees render this case certworthy. As the Court of Appeals recognized, the relevant question is not whether funding processes are "discretionary" but whether they are *neutral*. Only if facially neutral discretionary criteria are used to subtly favor religion (which petitioner did not allege here) is there constitutional concern. Petitioner's claim of a circuit split on this issue is unfounded, identifying only a 1986 case decided without this Court's recent guidance and footnote *dicta* in a case that did not decide an Establishment Clause issue.

Petitioner's attack on the modest $400-per-participant funding to AEAP grantees to recoup a portion of their administrative expenses is no more deserving of the Court's attention. Petitioner argues that while the statute forbids use of these funds for religious purposes, there are inadequate mechanisms to ensure that the restriction is followed. It is undisputed, however, that the amount of funding here is "much less" than the actual secular administrative costs grantees incur per participant. Further, there *are* significant mechanisms for restricting the use of these funds, including